BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

MASON COUNTY; STEPHEN J. WILMUS; ARTHUR R. JOHNSON; JOHN and JANE DOE SPENCER; SKOKOMISH FARMS, INC.; GEORGE and JANE DOE VALLEY; A. HALDANE and JANE DOE JOHNSON; and RAY KEALY, Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	SHB Nos. 88-25, 88-31 and 88-36 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the appeal of eight civil penalties of $1,000 imposed upon each of the appellants for failure to comply with regulatory orders calling for removal of diking along the Skokomish River, came on for hearing before the Board; Wick Dufford, presiding; Judith A. Bendor, Chair; Nancy Burnett; Paul Cyr and Jon Wagner.

The hearing was commenced in Shelton, Washington, on January 22, 1990, and a site tour was conducted by the Board. Seven days were devoted to hearing the case, the final day being March 13, 1990. The filing of closing briefs was completed April 9, 1990.

Appellant Mason County was represented by Michael E. Clift, Deputy Prosecuting Attorney; Stephen J. Wilmus represented himself; the other individual appellants (hereafter collectively referred to as the Property Owners) were represented by Richard T. Hoss, attorney at

law. The Department of Ecology was represented by Allen T. Miller, Jr., Assistant Attorney General. The proceedings were reported by reporters for Gene Barker and Associates.

PROCEDURAL HISTORY

Three separate appeals were filed and consolidated for hearing. Notice of the first, filed by the Mason County Department of Public Works, was received by the Board on June 8, 1988. It became our SHB No. 88-25. The second appeal was filed by Stephen J. Wilmus on June 11, 1988 and given cause number SHB No. 88-31. The Property Owners' appeal was received by the Board on July 22, 1988, and became our SHB No. 88-36.

A prehearing conference was held on August 15, 1988 at which a hearing date in January 1989, was established. Thereafter in September and October 1988, the parties lodged several motions with the Board: a) Motion for Partial Relief from Stay (Property Owners), (b) Motion for Summary Judgment (Mason County), (c) Cross Motion for Summary Judgment (Ecology), (d) Motion to Dismiss Ecology's Motion. Oral argument on the stay issue was held on November 21, 1988. The Board orally decided to grant permission to the County and Property Owners to conduct work on the diking system in emergency situations as necessary to protect property and preserve the status quo as to the structure. The other motions were held in abeyance pending further submissions by the parties.

Prior to the decision on these matters, the parties advised the Board that the dispute was in the process of being settled. Accordingly, the Board cancelled the January 1989 hearing and awaited a stipulation from the parties.

On August 4, 1989, Ecology requested that the matter be placed back on the Board's calendar for hearing. Thereafter, the January 1990 hearing dates were established.

At the hearing, witnesses were sworn and testified. Exhibits were admitted and examined. From the testimony heard and exhibits examined, the Board makes the following:

FINDINGS OF FACT

1

The Skokomish River arises on steep, forested slopes of the Olympic Mountains and drains a watershed of approximately 240 square miles of the southeast portion of the Olympic Peninsula before emptying into Hood Canal near the Great Bend. The North and South Forks of the river flow out of the uplands and join near the upper end of a relatively flat, low-gradient valley, about nine miles above the river's mouth. Vance Creek, a major tributary, joins the South Fork less than a mile above its confluence with the North Fork.

2

Mean annual precipitation onto the Skokomish basin ranges from 200 to 220 inches per year in the upper watershed to 80 to 90 inches

per year in the Skokomish Valley. Average precipitation, basin-wide, is about 133 inches per year. More than three-fourths of the yearly precipitation, mostly rainfall, occurs from October through March.

3

The Skokomish Valley, bottom land adjacent to the main stem river, is the focus of the instant appeals. Topographically this valley is shaped like a "W", with the south side being slightly lower than the north. Over millenia the river channel has wandered back and forth across the valley floor. But, in the last century the upper main stem has remained confined to the valley's north side.

4

The valley area, much of it occupied by open fields, has been devoted primarily to agriculture since the late nineteenth century.

The lower end of the river, at the delta and immediately above, is a part of the Skokomish Indian Reservation. Upstream of the Reservation are farm lands in private non-Indian ownership.

Until the 1950's dairying was the dominant form of agriculture. Currently Christmas tree farming is the main agricultural pursuit. However, considerable land is still devoted to pasture and other crops are grown. Three fish hatcheries are operated in the valley.

Residences are scattered throughout. There is a community church, a fire station, a Grange Hall and a school.

5

Although newcomers are not unknown, much of the valley farming community is made up of descendants of families who were the original non-Indian settlers of the area. In many cases the third generation has assumed stewardship of lands acquired by the labor of homesteading. The feeling of attachment to the land runs strong and deep in the community.

6

Historically the valley has been subject to frequent flooding, typically overflowing once or more a year during the winter rainy season.

7

The flow regime in the main stem through the valley was significantly altered in 1926 when the first Cushman Dam was built upstream on the North Fork. The project impounded water and, then, diverted it from the natural stream bed through a tunnel leading to a powerhouse on Hood Canal near Potlatch. The effect was to eliminate all but around 10 percent of the North Fork's flow into the valley.

8

Despite the hydroelectric project on the North Fork, flooding continued to occur in the valley. More than 40 years ago, valley residents began constructing a series of low level dikes in an effort to protect their properties from floodwaters. In the interval between

then and now, bits of pieces of diking have been pushed up here and there along the river and Vance Creek, as the needs of the moment have seemed to dictate.

Moreover, the development of agriculture and settlement changed the character of drainage along the valley floor. Numerous original side channels and sloughs have been filled or plowed over through the decades.

Thus, the physical reality confronting the valley today is significantly altered from the natural condition.

9

The low level dikes in the valley were, in general, constructed without benefit of detailed designs and specifications. No formalized plan was followed. No regular inspection and maintenance program was implemented. The resulting dikes (in place prior to 1975) were discontinuous and varied in height, width, thickness and contents from one location to another.

10

In recent years, the frequency and severity of floods in the valley has increased. Over the same years significant logging has occurred in the upper watershed of the South Fork and rates of erosion have increased from the steep slopes. The result is a dramatic aggrading of the riverbed on the main stem of the river, most noticeably in the last decade. A major effect of this raising of the channel bottom is reduced capacity within the river banks to carry

waters. Under these conditions, a lesser discharge is needed to cause a flood than used to be the case. In addition erosion along the stream banks has been accelerated as the river seeks a wider channel.

The increase in riverbed sediments has tended to offset the protection offered by the low level diking system.

11

Since the 1940s a number of flood control investigations have been conducted in the valley, each concluding that a major government-funded levee system, designed to protect against a 100 year or greater flood, would have a negative benefit to cost ratio.

Nonetheless, during the years that low level dikes were being installed, the State of Washington participated in the creation of flood control works in the Skokomish Valley by providing cost sharing funds to Mason County, approving flood control zone permits and issuing hydraulic project approvals. Until very recently, the emphasis of both public and private efforts has been on structural methods of flood control.

12

In keeping with this emphasis, Mason County in 1976 formed a flood control district in the Skokomish watershed with authority to tax property owners to finance flood control projects.

The governing body of the district is the Board of County Commissioners. The commissioners, however, are assisted by an advisory committee which includes residents of the Skokomish Valley.

In 1984, the advisory committee, recommended that state funding assistance be sought for two diking projects in a part of the valley, identified as an area where flood waters frequently leave the main channel.

13

The problem area identified by the committee was the river reach, somewhat over a mile in length, centering on the community church (situated at approximately river mile 8.3). Just below the church, the river takes an abrupt jog to the north and closely approaches the Skokomish Valley Road, the only thoroughfare through the valley. Flooding across the road and through the church property has been chronic. When this occurs, the upper valley is cut off. Ambulances, fire trucks and other vehicles cannot get through. To protect the road, the County has long maintained a dike opposite the church.

The two diking projects recommended in 1984 by the advisory committee involved dike extension or dike restoration from the church downstream about 4200 feet. Applications for state financial assistance to these projects were made to the Department of Ecology. In January of 1985 Ecology advised the County that these projects were eligible for funding.

14

In the applications for state funding assistance, the advisory committee noted that flood waters which leave the channel in the vicinity of the community church flow southeasterly across farmlands

until they reach the opposite side of the valley on the south and then flow easterly down this lower side, re-entering the main channel between river miles 5 and 4.

The committee viewed aggrading of the streambed as the main source of the problem, stating:

> *The continued deposit of gravel in this area will eliminate the river's capacity to contain any flood water flows. When this happens, the Skokomish River will seek a new channel. (emphasis in original.)*

That the proposals would not cure this threat was explicitly recognized:

> *The Skokomish Flood Zone District Committee does not feel that the proposed dike and rip rap project will permanently eliminate the threat of the river seeking a new channel, but it is expected that this project will eliminate the immediate threat of flood damage and provide time for a more permanent solution to be identified and implemented.*

15

In November of 1985, the County on behalf of the flood control zone district submitted an additional matching fund request to Ecology. This application called for constructing an earth and gravel berm about four feet above the existing ground from "Church" upstream for about 2,400 feet.

The proposal was intended to fill a gap in the diking system through which flood waters have on numerous occasions escaped. The project was described as complementary to the proposals previously

submitted.

16

When all three of the diking proposals are looked at together, they describe a continuous dike around 6600 feet in length, roughly paralleling the river in either direction from the church.

The distance of these dikes from the ordinary high water mark of the river is beyond 200 feet, except along the short stretch next to the County road.

17

In March 1986, Mason County submitted grant agreements to Ecology on the first two diking projects. Ecology then advised the County to submit project design plans and specifications, undertake required environmental review and secure required permits. While waiting for these items, the agency said it would reserve funds for the projects.

18

In April of 1986, the County on behalf of the flood control zone district executed an environmental checklist covering the original two diking projects. The checklist described the projects as within the Skokomish River "floodway" and identified needed permits as a) shoreline substantial development permit, b) a hydraulic project approval and c) a water quality standards modification. Applications were filed for all three of these permits. In addition a declaration of significance (DS) was issued, pursuant to the State Environmental Policy Act (SEPA), calling for the preparation of an environmental

impact statement.

The two diking projects were combined for purposes of the permit applications and a rock groin extending into the river in the vicinity of the river's northerly jog was added.

19

After the submission of these applications, activity in pursuit of the projects seems to have halted. The record does not reflect that any of the permit applications were acted upon or that an environmental impact statement was ever written.

Instead, in November of 1986, the County received a letter from Ecology reflecting a change in approach on state assistance to new structural flood control projects. The letter referred to all three of the diking projects, and said that "upon further analysis" the agency had determined that "raising or extending dikes beyond their original configuration fails to meet the requirements established for the [funding] program."

Ecology did not cancel funding outright for the projects, but asked for clarification of what portions were to be new construction and what were to be repair or restoration of existing dikes. The November 1986 letter was the first official suggestion from the state that the diking proposals might not be approvable.

20

Notwithstanding Ecology's apparent change of approach, Mason County submitted slightly repackaged matching fund applications to

Ecology in March of 1987 for essentially the same overall Skokomish River diking as had been applied for earlier. In June of that year, instead of reiterating its earlier concerns, Ecology advised that the projects were again on its priority list for funding.

21

In the summer of 1987, the County Public Works Department decided to pursue a considerably smaller project, centering on the short section of dike which the County had traditionally maintained across the road from the church. The groin mentioned in the grant proposals was changed to a rock weir to be placed in the river to reduce the force of water against the bank and, therby, prevent erosion.

The contemplated diking was the refurbishing of around 650 feet of existing levee and the construction of 110 feet of new dike on the upstream end to fill the gap between the County's works and an existing privately-built dike.

At some point the County Public Works Department formed the opinion that a shoreline substantial development permit was not necessary for this smaller project. None was ever applied for.

22

The County took the following actions in preparation for the planned construction:

- August 20, 1987, applied for a hydraulic project approval from Department of Fisheries.

- August 24, 1987, sought a release from Haldane Johnson for

entering his property in connection with the 110 feet of new diking.

- August 27, 1987, filled out an environmental checklist (not showing a substantial development permit as among those needed).

- September 3, 1987, applied to Ecology for a water quality standards modification.

- September 3, 1987, submitted a revised hydraulic project application, dealing only with the rock weir (the sole portion of the project occuring within the wetted perimeter of the stream).

- September 8, 1987, issued a determination of nonsignificance (DNS) under SEPA, starting a 15 day comment period.

23

During the DNS comment period the County received no adverse comments. On September 21, 1987, Fisheries advised that they were in agreement with the weir proposal and intended to issue a permit for it.

Also on September 21, the Public Works Department sent a letter to Ecology's grant contract officer for flood control projects, advising that commencement of the project was imminent and urging him to make funds available for the work. The letter referred to a site visit by this officer on September 16, and seemed to assume that state funding would be forthcoming.

On September 23, the end of the comment period, the County received a letter from the environmental review section of Ecology advising only that the proposed project "must comply with the goals and standards of the local shoreline master program." No specifics

were provided. Nothing was said about the need for a substantial development permit.

On the same day, Fisheries issued its hydraulic project aproval, and the Public Works Department, persuaded that nothing further remained to be done, commenced work.

24

When the County began working on the dike, two private landowners, Jerry Richert of Skokomish Farms and Haldane Johnson undertook to extend the structure in both directions from the County's work area. Through their efforts the approximate limits of the larger diking project described in the various grant applications were reached. The overall result was a dike of about 6500 feet. Of this, the County worked only on approximately 760 feet immediately across from the church.

25

The diking efforts of Johnson and Richert were conducted independently of the County's diking work. There is no evidence that the County, in any way, acted in concert with the landowners to accomplish the larger overall project.

There is a dispute over whether the County, through its dealings with these landowners prior to the time work began, led them to believe that the construction they performed would be exempt from shoreline permit requirements.

We make no findings as to the state of mind of Johnson and Richert in regard to the need for permits or on the reasonableness of what they may have thought on the subject.

26

We do find that Johnson and Richert were frustrated by governmental delay and vacillation and proceeded with the strong conviction that action was necessary to save their properties and those of their neighbors from severe damage and loss.

With the exception of the Wilmuses, the private dike building effort had the approval of the owners of the property affected.

27

Ecology became aware, on September 23, 1987, of the diking work going on in the Skokomish Valley. On the following day the program manager for the shorelands program phoned Mason County Commissioner John Eager and expressed concerns about work in the floodway without a shoreline permit.

On September 25, a member of Ecology's shorelands staff wrote the County's General Services director and expressed the view that the diking required a shoreline permit. In addition he stated:

> *From a shorelands use perspective, we do not foresee a problem with these projects provided the agencies with expertise i.e. Dept. of Fisheries, Wildlife, WDOE Floodplain Management, etc. are all satisfied.*

He concluded by saying: "We trust you will follow through with requiring a permit for this proposal and will act immediately."

Thereafter, on September 30, Ecology's shorelands manager wrote a letter to Commissioner Eager, confirming the telephone conversation of September 24, and detailing Ecology's concerns regarding the lack of permits. This letter stated that the work appeared ineligible for reimbursement through a grant agreement because it was not an approved floodplain management activity. The letter noted that, because of potential regulatory action, a recommendation had been made to County staff that all related "work activity" immediately cease.

28

The County did cease its construction work. Our record does not pinpoint the precise date, but it was sometime prior to October 6. When the County stopped work, additional material had already been placed on the 650 foot section of existing dike and new material had been placed for the 110 foot upstream extension. However, the rock weir had not yet been built. The rocks for the weir were simply stockpiled at the site and no further work was done, or has been done since.

At some point, during the same time frame, the private landowners also ceased their construction efforts. Both the County and the private landowners stopped work before completing the jobs they had planned.

On October 6, 1987, Ecology personnel met with Mason County officials to discuss the matter. On October 12 and 14, Ecology staff inspected the site. The outgrowth of these investigations was the issuance of a series of Orders.

First, on October 16, 1987, Ecology issued a formal written Order to cease and desist to the Mason County Public Works Department. The Order asserted that the Skokomish River levee construction is inconsistent with the provisions of the Mason County Shoreline Master Program and is a violation of the Shoreline Management Act "since no permits have been obtained." The Order instructed the County to remove "all dikes constructed without a valid shoreline permit."

Subsequently, on October 26, 1987, this Order was revised to provide more specific instructions for site restoration, calling for the removal of "all earthen material, rock and woody debris placed by Mason County during the time period from January 1, 1987 to October 6, 1987...".

In the meantime, on October 22, 1987, Mason County and Ecology jointly issued Orders to various private owners of property adjacent to the County's work area where it was thought additional diking had been done. At the time neither Ecology nor the County knew who had done the additional work. The Orders of October 22 were issued to, among others, Arthur R. Johnson, Stephen J. Wilmus and wife, John

Spencer and wife, Skokomish Farms, Inc., George Valley and wife, and Arvid (Haldane) Johnson and wife.

These documents ordered work to cease on each of properties as described, recited the lack of shorelines permits, asserted potential hazards and required the removal of the dikes constructed.

On November 12, 1987, a similar joint state/county Order was sent to Ray Kealy.

30

No additional work on constructing the dikes has been done by either the County or the private landowners since the Orders of October and November, 1987, were received.

However, the instructions for removal of the dikes have not been complied with.

31

On March 17, 1988, Ecology issued a revised Order to Mason County giving new instructions for removal of the diking and calling for completion of this work by May 16, 1988.

On April 15, 1988, Ecology sent a similar revised Order to John Spencer, the Wilmuses, Arthur Johnson, the Valleys, Skokomish Farms, the Arvid (Haldane) Johnsons and Ray Kealy. All were ordered to remove material placed between January 1, 1987 to October 6, 1987. All were given until June 3, 1988, to complete the removal and restoration job.

Each of the revised Orders carried the statement that all previous Orders "are hereby declared null and void."

32

On May 26, 1988, Ecology issued a notice of penalty ($1,000) to Mason County. The stated basis for the penalty was the failure of the County to comply with the revised Order of March 17 which required "appropriate actions regarding removal of dikes along the Skokomish River...".

On June 20 1988, Ecology sent similar penalty notices (each assessing $1,000) to the various private landowners. The basis set forth was failure to comply with the removal orders dated April 5, 1988.

33

While the dike building episode and subsequent enforcement efforts were unfolding, Ecology was working on a project designed to provide local government authorities with a comprehensive overview of flooding problems on the Skokomish River and of possible alternatives for action.

A report, assembling and analyzing available information on the drainage, was in preparation in 1987 and ultimately published in March 1988 under the title: "Skokomish River Comprehensive Flood Control Management Plan Preliminary Draft Plan."

The draft plan devotes considerable attention to non-structural

flood control alternatives, such as management of land use practices in the upper watershed, early warning systems, flood proofing techniques, emergency preparedness planning, and permanent relocation of structures.

However, it does not rule out low-level diking as a part of an overall strategy.

34

Since Ecology's initial objections to the dike building in September, 1987, Mason County has professed a willingness to cooperate in solving the problem.

Not only did the County join with Ecology in issuing the original cease and desist Orders to the private landowners, but it went through the SEPA process and, in April 1988, issued a DNS for the removal of the portion of the dike it had built. The County did not proceed with removal of the material because the owner of the land involved refused the County permission to re-enter the property.

The parcel in question was owned by John Spencer at the time the construction was carried out in 1987. Later in that year it was quit claimed to Haldane Johnson.

35

Haldane Johnson's reason for refusing the County entry was that he was in the process of applying for permits to improve the existing dike rather than seeing it removed.

He and the other Property Owners have maintained from the outset that the diking work performed on their lands is exempt from any shoreline permit requirement. However, in May 1988, applications were filed with the County for permits after-the-fact. The County has taken no action on these applications, pending resolution of these appeals.

36

At the time the diking work was performed on the property of George Valley and wife, the parcel was not owned by them. It was owned by George Valley's mother. She authorized the work. She died on May 2, 1988, and title then passed by inheritance.

37

Ray Kealy independently did diking work on his own property prior to calendar year 1987. He performed no such work in 1987 and no diking work was authorized by him or performed by others on his property during 1987. The rubber tires placed in the dike on his property and stockpiled behind the dike were brought in before 1987.

38

Stephen Wilmus was not home when the diking work was performed on his property and the project was carried out there without his consent or that of any member of his family.

39

Viewing the entire 6500 feet of dike placed in 1987 as though it

were a single development, we find the fair market value to be substantially in excess of $2,500.

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The physical structures left in place by the County and the private landowners prior to stopping work do not comply with standards for levees established by the Soil Conservation Service (SCS) of the United States Department of Agriculture, nor with any other identified standards for proper dike construction.

In general, the method of construction was simply to push up earthen material borrowed from areas alongside the dikes. The dikes are placed immediately between trees in some locales, and in others living trees are incorporated into the structure itself. By and large, the structure is inadequately compacted and it appears that some woody debris has been mixed with the earthen fill. No erosion protection is provided, and there is evidence of erosion occurring from the new dike walls. Adjacent to the dikes where construction dirt was borrowed, existing trees in places have been left on root-ball islands.

41

In the event of a major flood (100-year or greater), the weight of evidence is that the existing dikes would fail. Below the point of failure, the effect would be like a dam breaking, a serious danger to anyone or anything in the path of the sudden discharge.

42

At this juncture we are not able to determine, however, that a properly built dike would present significant immediate safety hazards.

We do not believe that the present structure is contributing measurably to stream bank erosion opposite, to changes in channel width or depth or to the process of aggrading. The new construction has little, if any, influence on the stability of the river system.

43

If the 1987 construction were safely and properly done, we are unsure what effect it would have on the profile of the 100-year flood. Although the 1987 work increased some levee elevations and closed some gaps, the precise dimensions of what was added to what was already there are far from clear.

It was not proven that the present structures are higher than a 100-year flood profile. Therefore, we cannot rely on predictions of profile effects based on that assumption.

Furthermore, we share the County's doubts about the accuracy of the valley cross sections, derived by the Federal Emergency Management Agency (FEMA) and used to predict the physical contours of the 100-year floodway. Ecology's reliance on the same data source undercuts its assertions about the effects of the 1987 diking on flood elevations.

The instant record fails to demonstrate that the present dikes, if properly built, would adversely affect the regimen of the stream during a major flood event.

44

Given the rapid aggrading of the river bottom, the present dikes, if properly built, might not differ significantly in terms of flood effects from the system in place 15 or 20 years ago with the original dikes. Moreover, it is very difficult under present circumstances to tell the new construction from the old.

Assuming feasibility, the abatement of additions made in 1987, as ordered by Ecology, would eliminate whatever safety hazard is presented by improper construction techniques in that year. But it is apparent that the structural safety problems could be eliminated by building the dikes to appropriate standards, as well as by tearing them down altogether.

45

In sum, we find the physical situation to be as follows:

1. The Skokomish River system is unstable and no system of low-level dikes will change that.

2. Neither the present diking nor a properly constructed system of low-level dikes is likely to have any significant effect on accelerating or worsening the conditions of instability.

3. The present diking is not built to recognized standards and presents a serious safety hazard.

4. A properly constructed system of low-level dikes might not itself adversely affect flooding characteristics in a major flood and could provide a measure of protection from recurring high-frequency floods of lesser severity.

5. No system of high-level dikes, built to withstand a major flood, is likely to be constructed because of its cost.

6. Unless the problem of riverbed aggrading from high sediment loads is somehow solved and corrected, the river sooner or later will leave its present channel and seek a new one.

7. Therefore, the gains that the County and the Private Landowners can achieve with a properly constructed system of low-level dikes are likely to be of a short-term nature. On the other hand, no long-term negative effects of such a system have been shown.

46

The Skokomish River is a shoreline of statewide significance downstream from the confluence of the North Fork and South Fork. The area in question is within an environment designated as "Rural" under the Mason County Shoreline Master Program. In the fall of 1987, the master program did not explicitly address diking projects. The program did, however, have sections devoted to "Landfill" and to "Shoreline Protection".

On March 1, 1988, Ecology adopted as part of the Washington Administrative Code amendments to the Mason County master program,

including a new Section 7.16.150 entitled: "Flood Protection and Shoreline Stabilization." This new section incorporates under the heading "Policies" a preference for "non-structural flood control solutions wherever possible."

47

The history of state government involvement with flood control in the Skokomish Valley over the years shows an evolution. Early on, the structural approach was not discouraged and, to a degree, the state participated in it. In recent times, the state's emphasis has shifted to non-structural measures, but this shift occurred only after substantial alterations to the natural environment upon which the residents of the valley have come to rely.

Until the instant enforcement actions were brought, the County and the Property Owners were not advised that dikes could not be built. Indeed, in the early innings of the present episode, Ecology's primary concern seemed to be that shorelines permits had not been obtained. Not until the hearing before this Board, did it become clear that Ecology was taking the position that the building of the dikes is a substantive violation of shorelines law, not just because of improper construction methods, but also because dikes should not be built in the floodway at all. In short, Ecology has ended by saying that had permits been sought they could not have been issued.

Any Conclusion of Law which is deemed a Finding of Fact iss hereby adopted as such.

From these Findings of Fact, the Board reaches the following:

CONCLUSIONS OF LAW

1

We conclude that the diking in question occurred within the geographical reach of the Shoreline Management Act (SMA), chapter 90.58 RCW.

The act regulates all developments "on shorelines of the state." RCW 90.58.140(1). Shorelines of the state include associated wetlands. RCW 90.58.030(2)(c)(d)(e). "Wetlands" include

> *those lands extending landward for two hundred feet in all directions as measured on a horizontal plain from the ordinary high water mark; floodways and contiguous floodplain areas landward two hundred feet from such floodways . . . " RCW 90.58.030(2)(f). (Emphasis added.)*

"Floodways" mean

> *those portions of the area of a river valley lying streamward from the outer limits of a watercourse upon which floodwaters are carred during periods of flooding that occur with reasonable regularity, although not necessarily annually . . . RCW 90.58.030(2)(g).*

Under the facts, the diking which occurred in 1987 took place within the floodway of the Skokomish River and was, therefore, subject

development."to the SMA's requirements. 1/

2

The SMA's primary permit requirement applies only to "substantial developments" as defined in the statute. RCW 90.58.140(2). For an action to qualify as a "substantial development" it must meet several threshold requirements.

First, it must be a "development" as defined in RCW 90-.58.030(3)(d). That definition takes in "the construction or exterior alteration of structures," "dumping," "filling," "placing of obstructions." The diking in question falls within the definition of "development."

Second, a "development" is "substantial" if it has a fair market value exceeding $2500. RCWS 90.58.030(3)(e). For purposes of this threshold, we view the entire diking operation as a whole. Appellants would have us look at the County's and each property owners' dike segment as a separate project. Such an approach would be contrary to the SMA's purpose to foster "coordinated planning" in order to "prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines." RCW 90.58.020. See Merkel v.

1/ In the fall of 1987, the Mason County Shoreline Master Program encompassed even more extensive geographical coverage than the minimum compelled by the statute. Under Section 7.08.250 the county then included in "wetlands" the entire "floodplains" of rivers such as the Skokomish. See, Friends of the Columbia Gorge v. Skamania County, SHB 84-57 (1986).

Port of Brownsville, 8 Wn.App. 844, 509 P.2d 390 (1973). Moreover, individual segments of the dike alone, serve no functional purpose. Accordingly, we conclude that the diking in question is a "substantial development."

3

The statute also sets forth a number of specific exceptions to the general definition of "substantial development." We conclude that the 1987 diking work falls within none of the exceptions cited by appellants. See RCW 90.58.030(2)(e)(i), (iii), (iv), and (x).

In so doing, we are mindful of the statutory direction that the SMA be "liberally construed to give full effect to the objectives and purposes for which it was enacted. RCW 90.58.900. Hama Hama v. Shorelines Hearings Board, 85 Wn.2d 441, 536 P.2d 157 (1975). The rule of liberal construction has as its corollary the principle that exceptions are to be narrowly construed. Mead School District v. Mead Education Association, 85 Wn.2d 140, 530 P.2d 302 (1975).

The exception for "normal maintenance or repair" does not apply in that a substantial portion of the 1987 work was new construction adding to the original dikes or filling gaps between them.

The exception for "emergency construction" does not apply because the record does not demonstrate that the dike builders were faced with a situation of immediate peril which made recourse to the normal permit process impractical. WAC 173-14-040(1)(d). The work that was

done had been contemplated for years.

The exception applying to practices "normal or necessary" for farming was not, we believe, intended for projects of this magnitude. While this diking has the effect of protecting farmland, it was intended for far more--for the protection of the entire valley community including the County road, the church, residences and emergency services. See Ritchie v. Markley, 23 Wn.App. 569, 597 P.2d 449 (1979).

The exception for "operation and maintenance" of dikes pre-existing September 8, 1975, is inapplicable, again because of the conponent of new construction in the 1987 work. Operation and maintenance does not include significant expansion of the existing structure.

4

Since the development meets the general definition of "substantial development" and no statutory exceptions apply, a substantial development permit pursuant to RCW 90.58.140(2)(b) should have been obtained prior to undertaking construction.

5

This Board's review authority in this matter stems from RCW 90.58.210. In pertinent part, that section reads, as follows:

> *(2) Any person who shall fail to conform to the terms of a permit issued under this chapter or who shall undertake development on the shorelines of the state without first obtaining any permit required under*

this chapter shall also be subject to a civil penalty not to exceed one thousand dollars for each violation. Each permit violation or each day of continued development without a required permit shall constitute a separate violation.

(3) The penalty provided for in this section shall be imposed by a notice in writing, either by certified mail with return receipt requested or by personal service, to the person incurring the same from the department or local government, describing the violation with reasonable particularity and ordering the act or acts constituting the violation or violations to cease and desist or, in appropriate cases, requiring necessary corrective action to be taken within a specific and reasonable time.

(4) Within thirty days after the notice is received, the person incurring the penalty may apply in writing to the department for remission or mitigation of such penalty. Upon receipt of the application, the department or local government may remit or mitigate the penalty upon whatever terms the department or local government in its discretion deems proper. Any penalty imposed pursuant to this section by local government shall be subject to review by the local government legislative authority. Any penalty jointly imposed by the department and local government shall be appealed to the shorelines hearings board. (Emphasis added.)

Ecology has adopted regulations, under the general rulemaking authority set forth in RCW 90.58.200, which establish a slightly different regulatory regime. These regulations (not challenged in these proceedings) provide for the separate issuance of cease and desist orders, unaccompanied by a monetary penalty. Such orders may "in appropriate cases," include "the specific corrective action to be taken within a given time." WAC 173-17-040.

Civil penalties may be assessed, not only for permit violations or for development without a permit but for failure to "comply with a

cease and desist order issued under these regulations." WAC 173-17-050.

6

Because the construction was carried out without the required permit, cease and desist orders were clearly authorized by the statute and the regulations. The more difficult question of these cases is whether the demand that the dikes be abated was lawful.

The explicit basis for the civil penalties under appeal is the failure to comply with orders for corrective action issued in March and April of 1988. The action called for--removal of the 1987 diking--has not been done. Therefore, the appeals of necessity are directed to the validity of the underlying corrective orders.

Our review is concerned with the statutory standards for such orders: a) whether these are "appropriate cases" for corrective orders, and b) whether the abatement orders were "necessary corrective action."

7

In general, we think that orders to take corrective action are "appropriate" whenever activity on the ground has altered the status quo in some way not authorized by permit. However, just what sort of corrective action is "necessary" depends on the risks of harm to shorelines values in the particular circumstances.

The corrective order was intended, we believe, not as a punitive measure, but rather as a remedial device to be used to achieve (as far as possible) physical restoration of the environment. Such orders should be designed to eliminate "adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life," proscribed by RCW 90.58.020.

8

In cases where the harm or risks might be corrected by issuance of a properly conditioned permit, the only "necessary" corrective action could be simply to suspend activity and require that the permit process be pursued to completion.

Whether the permit process is all that is "necessary" is controlled by two variables: a) the exigencies of the situation and b) the ability of the project to meet the substantive requirements of the statute and regulations.

If what has been done creates substantial and ongoing risks of harm to health, safety, or the environment, then some sort of requirement for an immediate physical correction on-site may be "necessary."

Likewise, when it is clear that permits, if sought, could not be obtained for the kind of activity at issue, then abatement or some variation thereof would meet the "necessary" standard.

9

Here we conclude that abatement orders were "necessary" because of the safety risks created by the construction of dikes which do not meet accepted standards. The potential for special damage to people and property resulting from failure of the dikes is, we conclude, high enough to justify the issuance of abatement orders here.

10

However, we are not convinced that no permit could have been obtained in 1987 for the construction of properly designed low level dikes. Purely as a matter of shoreline law, we have found nothing in the statute or the master program, as it was written in the fall of 1987, which would prohibit such a system of diking. 2/

2/ The relevant use regulations then were as follows:

> **Section 7.16.150 Landfill**
>
> 1. Any permitted fills or shoreline cuts should be designated so that no significant damage to existing ecological values or natural resources, or alteration of local currents will occur, creating a hazard to adjacent life, property, ecological values, or natural resources.
>
> 2. Perimeters of fills shall be provided with vegetation, retaining walls, or other mechanisms for erosion prevention. Any fill impinging on a tideland shall be provided with a bulkhead in accordance with the guidelines on construction of bulkheads.
>
> 3. Shoreline areas shall not be considered for sanitary landfill or disposal of solid waste.

2/ continued

> 4. Fill materials should be of such quality that they will not cause problems with water quality. Wood product materials should be prohibited for landfills.
>
> 5. Priority should be given to landfills for water dependent users.
>
> 6. In evaluating fill projects and in designating areas appropriate for fill, such factors as total water surface reduction, navigation restriction, impediment of water flow and circulation, reduction of water quality and destruction of habitat should be considered.
>
> **Section 7.16.180 Shoreline Protection**
>
> 1. Shoreline protection measures which might result in channelization should be closely evaluated prior to construction.
>
> 2. Riprapping and other bank stabilization measures shall be designed, located and constructed with intent to preserve the natural character of the area.
>
> 3. The use of automobile bodies for shoreline protection shall be prohibited.

However, such evaluation should be initiated through the permit process at the local level based on the analysis of a detailed application, appropriate environmental review and the development of facts about flood-profile effects which do not appear on our record.

11

We decline to evaluate whether the master program amendments approved and adopted by Ecology of March 1, 1988, preclude the

construction of low level dikes. The amendments appear considerably more specific and considerably more restrictive than the earlier program.[3/]

[3/] Under "Use Regulations" Section 7.16.150 now states the following:

> 1. The County shall require and utilize the following information during its review of shoreline stabilization and flood protection procedures:
>
> - River channel hydraulics and floodway characteristics up and downstream from the project area;
> - Existing shoreline stabilization and flood protection works within the area;
> - Physical, geological and soil characteristics of the area; and
> - Predicted impact upon area shore and hydraulic processes, adjacent properties and shoreline and water uses.
>
> 2. Conditions of Hydraulic Project Approval, issued by Washington State Department of Fisheries, may be incorporated into permits issued for flood protection and shoreline stabilization.
>
> 3. The County shall require professional design of shoreline stabilization and flood protection works where such projects may cause interference with normal river geohydraulic processes, leading to erosion of other upstream and downstream shoreline properties, or adverwse effects to shoreline resources and uses.
>
> 4. Groins on rivers, streams and lakes may be considered as a Conditional Use PROVIDED the applicant can demonstrate the appropriateness of the designed structure and the alternative shore protection measures would prove more detrimental to the geohydraulics and natural resource within the water body.

Although we conclude that abatement orders were "necessary" in light of the risks posed by the diking in place, such orders can be sustained only if directed to persons with legal responsibility for the conditions.

Such responsibility is properly placed on those who created the risks--here the dike builders--or on the owners of land who permitted the work or on the owners of land on which the dangerous conditions persist. See RCW 7.48.170, Great Northern Railroad v. Oakley, 135 Wash. 279, 237 Pac. 990 (1925).

3/ continued

5. Diking may be permited as a Condtional use PROVIDED:

a. Diking is set back to the edge of the floodway;

b. Timing and construction shall be coordinated with WDF and WDW;

c. Diking shall be designed and constructed to meet Soil Conservation Service technical manual standards and shall, at a minimum include (1) layered compaction, (2) removal of debris (i.e., three stumps, tires, etc.), and (3) revegetation and maintenance until ground cover is established.

6. Flood protection measures shall be planned and constructed based on a state approved flood control management plan, when available, and in accordance with the National Flood Insurance Program.

Thus, we hold that the Spencers are not insulated by having sold their property after the work was done. Neither are the Valleys aided by having acquired title only after the work was performed. Nor are the Wilmuses excused because the work was done without their knowledge. These matters may bear, to some degree, on the appropriateness of civil penalties, but do not serve to invalidate the abatement orders.

13

The only abatement order which was improperly directed was the order issued to Ray Kealy. His order, like the others, referred to diking done in 1987. Since as a factual matter, no diking was performed on his property in that year, his order required him to do nothing.

14

As to the others who received abatement orders, the failure to obey them was subject to the civil penalty sanction. This brings us to the appropriateness of the penalties assessed--$1000 each. Under WAC 173-17-030:

> *The choice of enforcement action and the severity of any penalty shall be based on the nature of the violation, the damage or risk to the public or to public resources and the degree of bad faith of the persons charged.*

Under all the facts and circumstances of the case, including the history of dealing between the parties, we do not think the interests

of justice would be served by the immediate imposition of monetary penalties. Viewing the evidence as a whole we are not convinced that either the County or the Property Owners acted in bad faith.

Furthermore, we agree with Ecology's enforcement officer that the principal object of civil penalties is to influence behavior, to motivate action to achieve compliance. Here given the high degree of uncertainty as to whether the work in question was needed, whether the state would assist in its financing, and whether it could legally be done, the penalties only served the purpose of generating appeals to seek clarification of these matters.

15

Therefore, we believe that the civil penalties assessed, herein, should be suspended until October 31, 1990--about the time the next rainy season is likely to commence. If by that time, the abatement of the 1987 dikes has not been accomplished, the penalties should become due and payable. If it has been accomplished, the penalties should be cancelled.

In the interim we suggest that the permit process be pursued and that any changes in the abatement orders dictated by the outcome be reflected in Ecology's conditional use decision. If any system of dikes is permissible, the corrective action which Ecology is seeking should be tailored to fit in with the new construction so that the

operation is effectively one project.4/

16

We have found these cases extremely troubling. The situation is one which defies easy solutions. The concerns and frustrations of the Property Owners are understandable. They are the victims of changes to the river over which they have had no control and have been faced with what they perceive to be a state government unsympathetic to their problems.

On the other hand, the insistence of Ecology on eliminating the immediate dangers created by their self-help is entirely consistent with the state's responsibility to protect the interests of the public as a whole. Further, Ecology is correct about the reality of the situation. The aggrading of the river bed makes reliance on diking at best only a short-term and partial solution to flood protection in the valley.

The County has been on both sides of the fence and has had no success on either.

4/ It is a general principle of nuisance law that the person maintaining a nuisance should be given an opportunity to demonstrate that the use can be continued on a basis which eliminates the problem. See, e.g., Grant v. Rosenburg, 112 Wash. 361, 196 Pac. 626 (1921); Chambers v. City of Mt. Vernon, 11 Wn.App. 357, 522 P.2d 1184 (1974).

After looking at the entire record, we are convinced of the sincerity and good faith of all the parties in seeking ways to deal with this very difficult situation. While compliance with Ecology's directives is pursued, we urge all the parties to proceed in the spirit of cooperation and mutual respect in a continued effort to identify and implement alternatives acceptable to all.

17

Any Finding of Fact which is deemed a Conclusion of Law, is hereby adopted as such.

From these Conclusions of Law, the Board enters the following

ORDER

The civil penalty assessed against Ray Kealy is vacated. All other civil penalties are affirmed, but are suspended until October 31, 1990.

If on that date Ecology is satisfied that the underlying orders have been satisfactorily complied with, the penalties shall be cancelled. If not, they shall then become due and payable.

DONE this 28th day of June, 1990.

SHORELINES HEARINGS BOARD

WICK DUFFORD, Presiding

JUDITH A. BENDOR, Chair

NANCY BURNETT, Member

JON WAGNER, Member

PAUL CYR, Member